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# In the Supreme Court of the United States

OCTOBER TERM, 1994

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ANDREW MITCHELL, JR. AND GEORGE A. SEAVER,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF MILITARY APPEALS*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the Judge Advocate General's role in preparing fitness reports for military officers who serve as judges on the courts of military review undermines the independence of those judges and renders petitioners' convictions invalid under the Due Process Clause.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the Court of Military Appeals in the case of petitioner Andrew Mitchell, Jr., Pet. App. 1a-62a, is reported at 39 M.J. 131. The opinion of the Navy-Marine Corps Court of Military Review in that case, Pet. App. 63a-131a, is reported at 37 M.J. 903. The order of the Court of Military Appeals in the case of petitioner George A. Seaver, Pet. App. 132a-133a, is unreported. The decision of the Navy-Marine Corps Court of Military Review in that case, Pet. App. 134a-137a, is unreported.

### JURISDICTION

The judgment of the Court of Military Appeals in *United States* v. *Mitchell* was entered on April 29, 1994.

The judgment of the Court of Military Appeals in *United States* v. *Seaver* was entered on June 21, 1994. A joint petition for a writ of certiorari was filed on July 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

## STATEMENT

1. The Judge Advocate General of the Navy is the principal legal officer for that military service. He assigns other commissioned officers to serve as judges of the Navy-Marine Corps Court of Military Review. In accordance with Department of the Navy regulations, he also submits fitness or efficiency reports respecting those officers. Navy regulations require preparation of fitness reports for all of the Navy's commissioned officers. The reports describe an officer's performance and conduct during the reporting period and form a basis for determining his retention, promotion, and future assignments. A typical report consists of a checklist evaluation in several key areas of performance, a narrative summary of the officer's accomplishments during the reporting period, and a comparative ranking with other officers of the same pay grade in the same organization. Pet. App. 5a-7a.

During the pendency of petitioners' appeals, the Assistant Judge Advocate General (AJAG) for Military Justice routinely prepared draft fitness reports for judges sitting on the Navy-Marine Corps Court of Military Review. He then submitted the draft reports to the Judge Advocate General for his review and approval. Each judge had the opportunity to provide information and comments for incorporation into his fitness report before its preparation. At the time, the AJAG (typically a Marine Corps colonel) would also be ranked against any

other Marine Corps colonels assigned as military appellate judges. Pet. App. 7a-8a.

2. Petitioner Mitchell, a member of the United States Navy, pleaded guilty at a special court-martial to wrongful disposal of military property, theft of property of the United States, indecent assault, and using indecent language, in violation of Articles 108, 121, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 908, 921, and 934. He was sentenced by a military judge to partial forfeitures of pay, reduction in grade, and a bad-conduct discharge. The findings and sentence were approved by the convening authority. Following a general court-martial tried overseas, petitioner Seaver, also a member of the United States Navy, was convicted on seven counts of sodomy with a child, and five counts of indecent acts with a child, in violation of Articles 125 and 134 of the UCMJ, 10 U.S.C. 925 and 934. He was sentenced by a military judge to confinement for 18 years, total forfeitures of pay and allowances, and dismissal from the service. The convening authority approved the findings and sentence. Pet. 4-5; Pet. App. 2a.

The Navy-Marine Corps Court of Military Review affirmed petitioners' convictions. Pet. App. 63a-131a, 134a-137a. In the case of Mitchell, the Court of Military Appeals granted plenary review and rejected his contention that the Judge Advocate General's preparation of military judges' fitness reports deprived those judges of their independence and thereby rendered his conviction invalid under the Due Process Clause. Pet. App. 1a-62a. In the case of Seaver, who raised the same issue in a separate proceeding, the Court of Military Appeals sum-

marily affirmed on the basis of its decision in Mitchell's case. Pet. App. 132a-133a.[1]

## ARGUMENT

Petitioners contend that military judges who are regularly evaluated by the Judge Advocate General lack the independence necessary to satisfy the requirements of the Due Process Clause. Petitioners do not allege that the military judges who reviewed their convictions were or appeared to be biased. They nevertheless contend that the appellate review process violates constitutional requirements, because a "reasonable observer could find that the Judge Advocate General * * * [has] interests within the military justice system which are opposed to those of the petitioners and other military servicemembers whose cases are being reviewed." Pet. 17. According to petitioners, military judges may consequently skew their decisions in the government's favor to receive favorable fitness reports.

Petitioners' contention is inconsistent with this Court's decision in *Weiss* v. *United States*, 114 S. Ct. 752 (1994), which rejected a due process challenge to the independence of military judges based on their service without a fixed term of office. The Court repeated its familiar admonition that the application of due process principles in the military context must take into account the special nature of military service, and it reiterated that constitutional tests developed for civilian life are not necessarily applicable to military institutions. 114

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[1] Unlike Mitchell, Seaver did not present the issue in his appeal to the Navy-Marine Corps Court of Military Review. See Pet. App. 134a-137a.

S. Ct. at 760-761. See, *e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981).[2]

More fundamentally, the Court's decision in *Weiss* expressed specific approval of the military justice hierarchy that Congress has established. Military institutions operate under a formal structure in which superior officers review the work of their subordinates. In the case of the military justice system, Congress has created a structure that enhances the independence of military judges while taking account of the military's organizational needs. As the Court explained:

> Article 26 [of the UCMJ] places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer. 10 U.S.C. § 826. Rather than exacerbating the alleged problems relating to judicial independence, as petitioners suggest, we believe this structure helps protect that independence.

114 S. Ct. at 762. The Judge Advocate General's authority over military judges includes the responsibility to prepare standard military fitness reports for those judges. Petitioners' suggestion (Pet. 6) that the preparation of those reports undermines the indepen-

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[2] Petitioners' reliance (Pet. 6-8) on decisions such as *Tumey* v. *Ohio*, 273 U.S. 510 (1927), which invalidated a state practice allowing a town mayor to try criminal cases and to receive compensation based on the amount of the fines he collected, is accordingly misplaced. Indeed, the situation in *Tumey* bears scant similarity to the situation faced here. In *Tumey*, the mayor had a "direct, personal, pecuniary interest in convicting the defendant who came before him for trial." 273 U.S. at 523. By contrast, the practice of subjecting military judges to standard military fitness reviews poses, at most, only a highly speculative prospect for compromising the judges' independence.

dence of military judges is not persuasive. The Due Process Clause does not mandate the same measure of autonomy for military judges (or state judges) that Article III provides to federal judges. Military judges are military officers, and they remain subject to standard performance evaluations. As this Court explained in *Weiss*:

> Like all military officers, Congress made military judges accountable to a superior officer for the performance of their duties. By placing judges under the control of Judge Advocates General, who have no interest in the outcome of a particular court-martial, we believe Congress has achieved an acceptable balance between independence and accountability.

114 S. Ct. at 762. The Court also noted that the military justice system is overseen by the civilian Court of Military Appeals. *Ibid.* That court "has demonstrated its vigilance in checking any attempts to exert improper influence over military judges" by limiting the criteria that a Judge Advocate General may use in rating military judges. *Ibid.* See *United States* v. *Graf*, 35 M.J. 450 (C.M.A. 1992), cert. denied, 114 S. Ct. 917 (1994); *United States* v. *Mabe*, 33 M.J. 200 (C.M.A. 1991).

The military justice system contains additional safeguards designed to prevent the type of improper influence that petitioners fear. The Navy, like the other military services, has adopted regulations to ensure that only the most qualified and experienced officers will be selected as military judges. Once selected, military judges are subject to the ABA Code of Judicial Conduct, which requires them to uphold the independence and integrity of their courts. A military judge may be challenged for cause whenever his impartiality may reasonably be questioned. Rule for Courts-Martial 902,

*Manual for Courts-Martial, United States, 1984*. In addition, Article 37(a) of the UCMJ, 10 U.S.C. 837(a), expressly prohibits any attempt to coerce or influence a military tribunal. Any officer who violates Article 37 is subject to criminal prosecution under Article 98 of the UCMJ, 10 U.S.C. 898. A military judge who is made the target of such improper influence can file a formal complaint to the Secretary of the Navy under Article 138 of the UCMJ, 10 U.S.C. 938. In light of those protections, the current method for evaluating the performance of appellate military judges does not present a serious systemic threat to the fairness—or the appearance of fairness—of the appeals process.[3]

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[3] The Court of Military Appeals noted some "dissatisfaction in the Navy appellate judges with respect to their officer-fitness-report system." Pet. App. 37a. That court properly concluded, however, that its appellate powers did not give it license to legislate changes to the routine functioning of the fitness report system, which is the responsibility of the Judge Advocate General of the Navy. Pet. App. 37a-38a. The Judge Advocate General has taken steps to improve the fitness report procedure for military judges. For example, the Navy AJAG for military justice will no longer be ranked alongside other officers serving as judges on the court of military review. Additionally, because the officer currently serving as the Navy AJAG for military justice has a number of cases pending before the court of military review in which he presided as military judge, he has recused himself from preparing the draft fitness reports for the judges of the court. The AJAG is also considering proposals to develop alternative methods of preparing fitness reports for military judges. Finally, the Navy Judge Advocate General has proposed revisions to the fitness report regulations to define appropriate and specific criteria for evaluating military judges. Those matters will receive appropriate scrutiny from the Court of Military Appeals in future cases. See Pet. App. 38a n.9.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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